No. 84-519

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In the Supreme Court of the United States

OCTOBER TERM, 1984

CLARK OIL & REFINING CORPORATION, PETITIONER

v.

LEHMAN BROTHERS KUHN LOEB, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the federal magistrate's trial and entry of judgment in this action with the consent of the parties pursuant to 28 U.S.C. 636(c) violates Article III of the Constitution.

Respondent Lehman Brothers Kuhn Loeb, Inc. brought this breach of contract action against petitioner in the United States District Court for the Eastern District of Missouri. With the consent of the parties, the case was referred for trial and entry of judgment to Magistrate David D. Noce. The magistrate granted summary judgment in favor of Lehman Brothers Kuhn Loeb. Pet. App. A3.

On appeal, petitioner asserted that the consensual reference to the magistrate violated Article III of the Constitution. The United States intervened pursuant to 28 U.S.C. 2403 to defend the constitutionality of 28 U.S.C. 636(c),

which authorizes district courts to refer civil cases to magistrates for trial and entry of judgment if both parties consent. The court of appeals, hearing the case en banc, upheld the constitutionality of Section 636(c) by a vote of 6-3 (Pet. App. A3).

In our brief in opposition in *Foreman* v. *Collins*, cert. denied, No. 83-1616 (Oct. 1, 1984), we explained why the question presented by petitioner does not merit review by this Court.* In addition, as petitioner recognizes (Pet. 8), every court of appeals that has considered this question has upheld the constitutionality of Section 636(c). This Court has consistently declined to grant certiorari. See *Fields* v. *WMATA*, 743 F.2d 890 (D.C. Cir. 1984); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984); *Puryear* v. *Ede's Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Collins* v. *Foreman*, 729 F.2d 108 (2d Cir. 1984), cert. denied, No. 83-1616 (Oct. 1, 1984); *Goldstein* v. *Kelleher*, 728 F.2d 32 (1st Cir. 1984), cert. denied, No. 84-5 (Oct. 1, 1984); *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (en banc), cert. denied, No. 83-1873 (Oct. 1, 1984); *Wharton-Thomas* v. *United States*, 721 F.2d 922 (3d Cir. 1983). See also *Phillips* v. *TVA Engineering Ass'n*, cert. denied, No. 83-1732 (Oct. 1, 1984).

*We are serving a copy of This brief on petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied as to the first question presented. The United States takes no position on the second question presented.

REX E. LEE
Solicitor General

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